

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

MARKEITA DESHUN ECHOLES §

VS. § **CIVIL ACTION NO. 5:08cv207**

KEITH ROY, ET AL. §

O R D E R

Plaintiff Markeita Deshun Echoles, an inmate previously confined at F.C.I. Texarkana, proceeding *pro se*, filed the above-styled and numbered civil rights lawsuit pursuant to 28 U.S.C. §§ 1331/1346 and in the nature of a claim under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The complaint was referred to United States Magistrate Judge Caroline Craven, who issued a Report and Recommendation for the disposition of the lawsuit. The United States and the Defendants have filed objections.

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by the United States and the Defendants to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of the United States and the Defendants are without merit.

The Plaintiff has specified that he is bringing a deliberate indifference claim against the Defendants. The United States is attempting to recast the lawsuit as a Federal Tort Claims Act case, but the Plaintiff is entitled to plead his case as he so desires. The objections as to the way the Plaintiff has pled his case lack merit. The remainder of the objections focus on problems with the Plaintiff's lawsuit, such as the Plaintiff's failure to exhaust his administrative remedies. The appropriate vehicle

for pointing out flaws in the Plaintiff's case is in a motion to dismiss. *See Jones v. Bock*, 549 U.S. 199 (2007) (failure to exhaust must be raised by the defendants as an affirmative defense). Therefore the findings and conclusions of the Magistrate Judge are adopted as the findings and conclusions of the Court. It is accordingly

ORDERED that the United States' motion to substitute as defendant (docket entry #42) is **DENIED**. It is further

ORDERED that the Plaintiff is permitted to proceed with his deliberate indifference claims against the named Defendants and that all other claims are **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915A(b)(1). It is further

ORDERED that the United States' motion to dismiss for lack of subject matter jurisdiction (docket entry #43) is **STRICKEN**. It is finally

ORDERED that the Defendants have twenty days from the entry of this Order to file a response to the lawsuit.

SIGNED this 1st day of June, 2009.



DAVID FOLSOM
UNITED STATES DISTRICT JUDGE